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Letter dated 12 April 2002 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

Further to my letter of 9 October 2001 (A/56/451-S/2001/953) concerning the unilateral application of the Greek Cypriot administration to join the European Union, I have the honour to transmit herewith a note written by Professor M. Mendelson Q.C., prepared in response to the opinion circulated by the Greek Cypriot side on the same matter (A/56/723-S/2001/1222).

I should be grateful if the text of the present letter and its annex would be circulated as a document of the General Assembly, under agenda item 62, and of the Security Council.

(*Signed*) Ümit **Pamir**
Ambassador
Permanent Representative

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Annex to the letter dated 12 April 2002 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

Note by Professor M. H. Mendelson Q.C. on the application of the Republic of Cyprus to join the European Union

1. In June 1997 I wrote an Opinion, at the request of the Government of Turkey, on the application by the Greek Cypriot authorities in Cyprus to join the European Union.[1] I came to the conclusion that membership would be contrary to the international obligations of Cyprus and that it would be contrary to the treaty obligations of Greece and the United Kingdom to assist in the acquisition of such membership. In July of the same year I wrote a Supplementary Opinion refuting the argument, which had been raised in some quarters, that the admission of Austria to the European Union was a precedent to the contrary. In October of the same year the Greek Cypriot Government caused to be circulated a Joint Opinion by Professors James Crawford, Gerhard Hafner and Alain Pellet, which *inter alia* sought to contest my views and came to the contrary conclusion.[2] In 2001 I was asked for my reactions to the Joint Opinion. I wrote a Further Opinion dated 12 September 2001, and this was circulated, as UN doc. A/56/451 and S/2001/953 at the request to the Permanent Representative of Turkey to the UN on 9 October 2001. My first two opinions were annexed to my Further Opinion.

2. On 17 November 2001 the same three professors wrote a further Joint Opinion, which was circulated as UN doc. A/556/723 – S/2001/1222. I have been asked to comment on this.

3. There is are no virtually new points in the Further Joint Opinion which I have not already answered in my previous Opinions; and there consequently seems little point in prolonging this war of words. In particular, it would seem to be excessive to require the reader to read the same arguments all over again. Accordingly, I simply wish to make a few brief points.

4. I said in my Further Opinion (paragraph 3) that, although the Joint Opinion was *in substance* a reply to my Opinion, in style it purported to be a general study. I observed that a consequence of this technique was that it "enables some of my arguments to be misdescribed, minimized or omitted. Secondly, it enables the authors to set up 'straw men' – hypothetical arguments against their position not made by me – which they can easily demolish". Exactly the same techniques have been used in the Further Joint Opinion.

5. Paragraph 4 of the Further Joint Opinion contains a serious and misleading elision. It begins by quoting in part some of the key provisions the Treaty of Guarantee. Specifically, the undertaking by Cyprus, in Article I(2), "not to participate, in whole *or in part*, in any *political or economic union* with any State whatsoever [misquoted in the Opinion as 'whatever' – a weaker term][3] or partition of the Island"; and the undertaking, by the Guarantors, Greece, Turkey and the United Kingdom, in Article

[1] Circulated, at the request of the Permanent Representative of Turkey to the UN, on 25 July 1997 as UN document A/51/951-S/1997/585.
[2] 17 October 1997. UN doc. A/52/481-S/1997/805.
[3] In French "quelque Etat ce que soit".

II(2) to prohibit, "so far as concerns them, *any* activity *aimed at* promoting, directly *or indirectly*, either union of Cyprus with any other State or partition of the island". (The italics are mine.) But the Opinion then goes on to say that "The question is whether the accession of Cyprus to the EU would involve 'union of Cyprus with any other State'". That is by no means the only question, or necessarily even the key one. For under the Treaty of Guarantee it is not just "union of Cyprus with any other State" which is ruled out, but *any* activity *aimed* at *promoting*, directly *or indirectly*, political *or economic* union, with any State whatsoever. This is a considerably lower threshold. It would be enough to show that membership in the EU would contribute even *indirectly and partly*, merely to a *degree* of economic union with Greece and/or other States. And even if we were to confine this to Greece alone, I fail to see how any impartial observer could possibly fail to see that the membership of Cyprus in the EU would contribute, at the very least, to *some measure* of closer economic union (at least) with Greece. Given the geographical proximity of the two countries, the close economic links which already exist between them – but which will necessarily be strengthened by membership – and the close ties of language and culture between the majority population of Cyprus and that of Greece, it seems inconceivable that this should not be so. This also seems to be the view of numerous Greek and Greek Cypriot politicians, who have stated with some satisfaction that the membership of Cyprus in the EU will help to bring about *enosis*. Thus, the threshold specified in the Treaty itself seems an insuperable barrier to Cypriot accession to the EU. And incidentally, for the three Professors to suggest that co-membership of other States will *water* down the existing ties between the two countries seems wholly unrealistic.

6. If I am correct in the above reasoning, there is no need, logically, to go any further, because my argument is already proven. But as a matter of fact I think one can go further, *ratione materiae* and *personae*, so to speak.

7. *Ratione materiae* because the EU is, at the very least, an economic union. Its former name, the "European Economic Community" made that clear enough, and now it has gone much further towards full economic, and a large measure of political, union. Although the name "European Union" is very apt in this particular case, but it is the *substance* of EU law which compels this conclusion. The EU would not need to be a full federal or unitary State to fall within the language of the Treaty of Guarantee, which prohibits participation in *any* union, political *or economic* (whole or partial), or steps towards it.

8. The Further Joint Opinion's attempts to circumvent this obvious fact, by asserting that economic associations were not covered by this prohibition, are unconvincing. It is true that, during the conversations which preceded the conclusion of the Treaty of Guarantee, the possibility of Cyprus joining associations like the European Coal and Steel Community or the European Free Trade Area was not ruled out. But, apart from the fact that the language of the Treaty of Guarantee as ultimately agreed is sufficiently clear,[4] there are two other answers to the point. First, like the UN, the bodies named were far looser associations than the EU. (Nor, indeed, were they organizations to which *either* Greece or Turkey belonged, so there was less of a

[4] And, indeed, paragraph 20 of my Further Opinion gives a fairer and more nuanced version of the drafting history than does the Further Joint Opinon.

threat of union by the back door.) Secondly, the constitutional arrangements which are themselves guaranteed by the Treaty include Article 50 of the Constitution of Cyprus, which clearly gave the leaders of each of the two ethnic groups a veto over membership of international organizations, including economic ones, unless both Greece *and* Turkey were members, which is not the case here.

9. The Further Joint Opinion's attempt to circumvent this by pointing out that there is a separate set of Final Provisions which *inter alia* reproduce parts of the Treaty of Guarantee is wholly unconvincing evidence that economic organizations are an exception: the provisions are complementary. And the attempt to bolster this weak argument by reference to Article 169 of the Constitution is spurious, as I had previously pointed out. First, the article is not concerned with membership *of* international organizations, but treaties *with* them, as well as treaties with other States on relatively minor or technical matters, namely "commercial matters, economic cooperation (including payments and credit) and *modus vivendi*", where parliamentary approval could be dispensed with. Membership of the EU certainly does not fall into that category. And secondly, Article 169 is *expressly* made subject to Art. 50, the relevant part of which (unlike Art. 169) is, furthermore, one of the "Basic" (unamendable) provisions of the Constitution.

10. The Further Joint Opinion is equally unconvincing *ratione personae*. *First*, as an example of their technique of putting words into my mouth, or of putting up a "straw man" which they can easily knock down, the authors tells us that the EU is not a State. I have made it entirely clear previously that that is not my position. My argument is that the EU is a *union of* States, which seems to me to be undeniable, both in terms of ordinary language and in terms of law. Not, perhaps, a full political union; but it is not just full political union that the Treaty prohibits. *Secondly*, they argue that "*any State whatsoever*" can only mean one single State (either Greece or Turkey), and not more than one. For reasons already explained in my previous Opinions, I dispute that this is the "ordinary" or necessary meaning of the language. Furthermore, whilst I myself pointed out that, whether a singular includes the plural depends on the context, (a) "whatsoever" militates against its just being Greece or Turkey; and (b), the context does not compel the interpretation advanced by the three Professors. Even if *enosis* with Greece was what was *primarily* envisaged, I have already pointed out that if Cyprus had sought union with, say, Malta, or indeed with the UK, it is by no means evident that the other Guarantors would have lacked the right to object. This would have been union with "any State *whatsoever*", and there might also have been policy reasons why this should be held to constitute a violation of the Treaty. And secondly, I have already suggested that if Cyprus had sought to join a union with both Greece and Malta, say, the other Guarantors would have been entitled to claim that this was a breach of the Treaty of Guarantee – again on both terminological and policy grounds. Thirdly, to enter the EU is to enter into an economic (and to some extent a political) union with other States, both severally and jointly: in other words, Cyprus would be entering into union both with another State (whatsoever) and with other States.

11. Paragraph 7(c) of the Further Joint Opinion takes my argument out of context. My reliance on Art. 50 of the Constitution was in order to help demonstrate that there is no foundation to the three Professors' argument that international economic organizations were outside the scope of the prohibition of union in the Treaty of

Guarantee. If it had been intended that they should not be covered, then Article 50, which is very detailed, would have made an exception for such bodies. Furthermore, there is a close link between the Constitution and the Treaty of Guarantee, as the authors themselves admit elsewhere (e.g. in paragraph 7(d) *in fine* and paragraph 11).

12. Paragraph 10 of the Further Opinion makes the point (virtually the only new one) that, in the absence of a Turkish Cypriot Vice-President, his veto cannot be cast and so the decision to accede is consequently valid and effective. This argument seems to ignore Article 52, which requires promulgation of any law or decision to take place within 15 days of *transmission to the respective offices* of the President *and* Vice-President. Presumably, there has been no transmission, so the condition precedent to publication has not been fulfilled. Moreover, it would certainly be contrary to the spirit, object and purpose of the provisions about the two communities' veto to say that, if one leader is prevented from exercising his veto, the whole arrangement can be treated as if had never existed.

13. Paragraph 7(d) is an egregious example of putting words into my mouth. Nowhere have I argued that, if Cyprus were to join the EU, "Greece or the UK would exercise authority in Cyprus as part of the EU". Indeed, I went out of my way in paragraph 24 of my Further Opinion to refute a previous attempt to set up and then knock down this "straw man". It is not (or, more precisely, not only) the exercise of authority over Cyprus by any other State which is prohibited by the Treaty of Guarantee, but union, economic or political, partial or total (or steps conducing thereto) - something much broader. The three Professors' definition of union is, with respect, a most peculiar one.

14. Paragraph 8 of the Further Joint Opinion further traduces my Opinion, by putting into my mouth more words I did not utter. My main point about the so-called Austrian "precedent" was not that the interested States clearly chose to waive a breach of Article 4 of the Austrian State Treaty in agreeing to Austria's membership in the UN. If matters had indeed been so clear-cut, I would have cited this case as a precedent *in favour* of my view. Instead, what I reported was the fact that there had been questions about the compatibility of membership with Austria's obligations under the State Treaty[5] but that in the end all parties agreed that Austria could join. In my view, given that the parties were capable of waiving any possible breach by Austria, this makes the example neutral: neither in favour of my argument nor against it.[6]

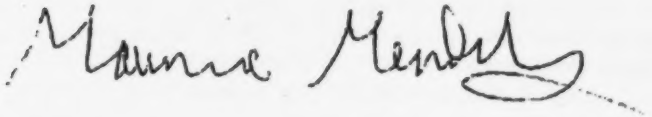
15. Incidentally, and *à propos* an earlier, similar problem with Austria, the Further Joint Opinion fails to deal with the point I made in paragraph 27 of my Further Opinion, which cites judicial support for my argument.

16. Paragraph 12 of the Further Joint Opinion begs the question whether the obligation embodied in Article 170 of the Cyprus Constitution - and also, as I previously pointed out, in Part II of Annex F of the Treaty of Establishment of 1960 - is a

[5] See e.g. footnote 32 of my Further Opinion.
[6] Incidentally, I also mentioned other possible bases for distinguishing the case of Austria from that of Cyprus.

"*general* MFN obligation of the entrant". And I repeat yet again: I am not arguing that Turkey has a current vested right to MFN treatment: just that it will not be possible, if Cyprus joins the EU, to conclude the anticipated treaty with Turkey to ensure that it obtains MFN treatment, and in any case treatment no less favourable than the UK and Greece.

17. I therefore see no reason to resile from the opinion which I previously expressed.



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26 March 2002